WORKMEN'S COMPENSATION AND THE THEORY OF PROFESSIONAL RISK.

The seventeenth report of the Bureau of Labor Statistics of the State of New York, for the year 1899, after a review of the English Workmen's Compensation Act of 1897, concludes:[1]

"It thus appears that England is on the way to industrial peace, in so far as concerns the compensation for industrial accidents, while the United States occupies the unenviable position assigned to England at the International Congress on Accidents in Milan in 1894, as being 'of all industrial countries the one in which legislation on liability for accidents is least favorable to workmen.'"

The English Act with reference to which these words were used, important as it was in marking a new departure by the acceptance of the theory of professional risk, was limited in its application to certain industrial employments. Since then, in England, the Workmen's Compensation Act of 1906 has swept away the exceptions and limitations of the earlier Act, and has applied the new principle to workmen in any employment, industrial or otherwise, and whether engaged in manual or clerical work, unless in the latter case they are paid more than £250 a year. Including, as it does, domestic servants, hotel waiters, shop assistants and clerks in offices, provided the remuneration of these last does not exceed £250 a year, the new Act in England is of very wide application. It gives compensation not only for accidents but also for certain enumerated diseases, classed as industrial diseases, *viz.*, anthrax, poisoning by lead, mercury, phosphorus or arsenic, or their sequels, and ankylostomiasis, a disease to which miners are particularly exposed.

During the last few years few subjects have occupied the attention of social reformers and of members of the various legislatures in the United States more than that of a modification of the law of the liability of employers to their employees for injuries sustained in the course of the employment.[2]

On the American Continent the principle of professional risk has made as yet but little progress but it has recently been accepted

[1] P. 673.

[2] The Bulletin of the Bureau of Labor No. 74, published by the Department of Commerce and Labor, January, 1908, contained an admirable summary of the position of the law at its date in the United States, and in the chief industrial countries of Europe.

in Canada by the Legislature of the Province of Quebec in the Act of 1909.[3] The law of that Province is based upon the old French law before the Code Napoléon, and the Act of 1909 follows in the main the French enactment of 1898. The preparation by the present writer of a short commentary on the Workmen's Compensation Act of 1909[4] has suggested to him that American readers might be interested in a brief statement of some of the points which have been decided in the interpretation of the Act in France and in England which have embodied the new principle of professional risk.

Before doing so, however, it will be well to explain shortly what that principle is, and the reasons which have led to its acceptance by almost all the countries of Europe and also by many of the British Dominions beyond the seas.

During the last thirty years one European country after another has become convinced of the inadequacy to modern conditions of the fundamental rule of the old law that an employer was not liable to compensate his employee for injuries received in an industrial accident unless some fault had been brought home to the employer. Switzerland was the first country to declare that for accidents in certain employments the employer was to be liable without any proof of fault.[5] But the elaborate German Act of 1884[6] has been the chief model upon which the legislation of other countries has been based. England adopted the new principle in 1897, and France in 1898, but neither country went so far as Germany had done fourteen years earlier. Under the German Act even the gross fault of the workman does not bar his claim to compensation. He can recover the full amount unless he intentionally caused the accident, whereas in England his claim is excluded by proof that the injury is attributable to his own serious and wilful misconduct. In France and in Quebec the "inexcusable fault" of the workman is a ground of reduction of the compensation, but it does not entitle the court to refuse compensation altogether. The German Act is more favorable to the workman than that of most other countries in compelling all employers to whom the law applies to insure against their liability.

If the countries of Europe, divided as they are from each other

[3] 9 Edw. VII c. 660.

[4] Montreal, John Lovell & Son Ltd., 1910.

[5] Loi fédérale du 25 juin 1881.

[6] Unfallversicherungsgesetz, 1, Juli, 1884.

by immemorial prejudices and jealousies, conspire to legislate in the same sense, and if the principle of this new legislation is adopted in distant lands, such as New Zealand, South Australia, The Transvaal, Newfoundland, and, now, Quebec, not to mention many other countries, this is surely a fact calculated to awake doubts even in the most conservative minds with regard to the justice of the old principles of law applicable to this matter.[7]

Few people who have much experience of the actual working of the present system can regard it as satisfying the notions of natural justice. It is a nightmare to the employer without being by any means a sure protection to the workman. It combines the maximum of cost with the minimum of gain to everyone except the lawyers. Their interest is of course important, but it is hardly the primary interest to consider. The employer whether he wins or loses has heavy costs to pay. When he wins, his recourse against the plaintiff is worthless. As the Scotch proverb says, "you cannot take the breeks from a Highlander," and you cannot get ten thousand dollars of costs from a poor workman. Very often an employer, grasping this truth, compromises a threatened action though he believes he has a good legal defence. In other cases employers who are insured against claims are compelled for the sake of preserving their recourse against the insurance company to dispute demands which they know to be just. The employer has learned by a long and sad experience that juries are "uncertain, coy and hard to please;" that in awarding damages they are swayed by every passing gust of sentiment, and that they are but little embarrassed by want of evidence of fault on the part of the employer.

On the other hand, the workman has, with slender or no resources, to face a long and uncertain litigation, with a vista of appeals and new trials even if he succeeds in getting a verdict. His witnesses, simple and unlettered, are unfitted to bear the brunt of skilful cross-examination, even when the tale they have to tell is plain and unvarnished. He may be bowled over by the defence of common employment. That doctrine was in my opinion admirably described by Mr. Birrell in a speech in the House of Commons in these terms:

"The doctrine of common employment was only invented in 1837, Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase.

[7]Mr. Floyd R. Mechem, of the University of Chicago, in 44 Amer. L. Rev. 221 (March-April 1910) addressed himself with courage to a defense of the rules of the common law, including the plea of "fellow servant," but he is a case of *Athanasius contra mundum.*

"Workingmen who had never heard of one another, nor had the faintest relation with one another, were held to be in common employment, and if one was injured by the negligence of the other there was no title to compensation. A plate-layer going home after his day's work was refused damages when he jumped on to a train, and was injured by the gross negligence of the engine-driver, on account of supposed common employment."[8]

Even when the workman succeeds in breaking down every defence, and is able to hold the verdict which he has won, he finds that a large part of the damages recovered goes into the pockets of his lawyer.

The English common law rules as to the remedy in accident cases especially after the doctrine of fellow servant had been developed, were not really worth transplanting to the American Continent, and now that they have been given up in the country of its origin it is inconceivable that the United States, where democracy is said to be triumphant, should long remain contented with them.

It is the conditions of the modern industrial world which have completely altered the situation. The old law of master and servant did no great injustice so long as all industry and manufactures were carried on by little bands of apprentices and workmen who might be looked upon as the family of the employer. Up to the eighteenth century the work of the craftsman was as a rule not especially dangerous. But all this has changed.

The manufacturing countries have become vast noisy workshops full of whizzing wheels, of electric wires, and of dangerous explosives. Before the days of steam, electricity and dynamite the workman could as a general rule protect himself by the exercise of ordinary care. His tools were few and simple. None of them moved except when he handled them and no one was in a hurry. It is, therefore, not to be wondered at that the law gave him no claim for damages unless some fault, at least of omission, could be clearly brought home to the employer. Under modern conditions, on the other hand, millions of workmen pass their lives in continual danger. They have to deal at close quarters with complicated machines, to handle terrible explosives, to run the risk of coming in contact with live wires, and, in a word, to face a thousand perils. Even the strictest care cannot always save them. A boiler may burst or some other accident occur, the precise cause of which can never be discovered. Thousands of lives

[8]The Times, May 18th, 1897.

are lost every year by this terrible *accident anonyme*, as French writers have well called it. In many kinds of employment the workman knows that he is exposed to mysterious and sudden danger.

He has to take the risk. It is inherent in the nature of the occupation. The master may have the best and newest plant. He may spare no expense and may employ all vigilance in adopting every means for protecting his men. The workmen may always be on the watch. But all this cannot prevent the accident.

Is it fair that the workman should bear this professional risk? His employer may not be negligent but, at any rate, the work is being carried on for his profit.

Opponents of this principle are in the habit of saying that the workman is paid at a higher rate just because his work is dangerous. There might be some force in this argument if it did not suffer from the misfortune of resting upon no basis of solid fact. Every-day experience shows that many of the most dangerous occupations are the least well paid, and that there is in fact no correlation between the rate of wages and the danger of the occupation.[9]

In England, the acceptance of the new theory that compensation ought to be paid without proof of fault was largely due to the zeal and energy of Mr. Chamberlain, and his speech on the second reading of the bill is an able defence of the new principle of professional risk. Mr. Chamberlain's experience as a large manufacturer, thoroughly familiar with the industrial life of the country, gave additional weight to his advocacy of this change of front. Mr. Chamberlain said:

"My experience is that good employers do not grudge compensation to workmen injured in their service, but they do grudge compensation which goes into the pockets of the lawyers. * * * I say the Bill is an honest attempt to deal with a great evil—with what I have ventured to call a great scandal—namely, that industrious honest workmen who come into trouble through no fault of their own in the course of their employment, and as the inevitable and consequential risk of that employment, should be turned into the street and thrown upon the rates without anything in the nature of legal compensation. * * * The Bill is based upon the principle of relieving the workman and not of punishing the employer. We are dealing with the whole of the accidents

[9]Careful statistics prepared for the German Government in 1887 showed that out of every hundred serious accidents forty-three were such as no care on the part of the employer could have prevented.

which occur in the course of employment, and nobody has ever pretended that the accidents for which the employer is morally liable have ever amounted to a mere fraction of the whole."

And, in the course of the same debate, Mr. Asquith said:

"There ought to be some provision enabling a workman who is injured through no fault of his own, and through no fault of his employer, to receive, I will not say compensation, for compensation in these cases is an inadequate and often an ironical term; but to receive, at any rate, some solation for the injury he has suffered in his operations as a soldier in the army of industry."[10]

Securus judicat orbis terrarum.

There must be something in a view which has commended itself as just to the legislatures of almost every civilized country except the United States, in which there are important manufactures. I do not know that Massachusetts and New York will be much consoled by knowing that they have the moral support of Montenegro and Bulgaria.[11]

In the various countries which have adopted the new rule there are, naturally, many differences in regard to the extent of its application, and as to other details. In France and England, to which I desire to confine my observations, the principle of professional risk, which was first limited to industrial occupations, has now been extended to workmen engaged in commercial enterprises as well as in occupations properly called industrial. The new Act in the Province of Quebec does not go so far, but is confined to industrial enterprises. It applies to accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building, or in factories, manufactories or workshops, or in stone, wood or coal yards, or in any transportation business by land or by water, or in loading or unloading, or in any gas or electrical business, or in any business having for its object the building, repairing, or maintenance of railways or tramways, waterworks, drains, sewers, dams, wharves, elevators or bridges, or in mines or quarries, or in any industrial enterprise, in which explosives are manufactured or prepared, or in which machinery is used, moved by power other than that of men or of animals, including under that term, among

[10]The Times, May 4th and 19th, 1897.

[11]The Law of New York, c. 352 of 1910, introduces a plan of compensation without proof of negligence, but only when the employer and employee have agreed to substitute the plan in place of their rights and liabilities under the existing law; c. 674 adopts the theory of professional risk only for certain specified extra hazardous occupations.

other things, the building trade, and any transportation business by land or by water.

The workman under all these acts has no longer to prove fault on the part of the employer, but otherwise the general rules in regard to onus of proof still apply. The plaintiff has to prove that the incapacity for which he claims compensation was caused by an accident happening to him as a workman in one of the protected occupations and that the accident happened to him by reason of, or in the course of his work. So in several cases where a sailor has been found drowned and there is no evidence as to how he got into the water, or what he was doing at the time, the courts both in France and England have held that the onus of proof has not been satisfied, and that the sailor's representatives were not entitled to compensation.[12]

The meaning of the term "accident" has been much discussed, and the courts of France and of England have arrived independently at pretty much the same conclusions. In England the courts have avoided definitions, but the House of Lords has held that the word "accident" was to be taken in its ordinary and popular sense, and some of the noble and learned Lords explained it as meaning "a mishap or untoward event not expected or designed."[13] In France "accident" has been authoritatively explained as "a bodily lesion coming from the sudden action of an external cause."[14] One of the best French writers on the subject adopts a very similar definition, "an injury to the human body produced by the sudden and violent action of an external cause"—"une atteinte au corps humain provenant de l'action soudaine et violente d'une cause extérieure."[15] But in France it is generally agreed that a nervous shock resulting in the incapacity of the workman is an accident.[16] In England this question has not been directly decided under the Workmen's Compensation Act.[17] But incapacity resulting from shock has been held by the Court of Appeal to be caused by "accident" in the sense of an insurance policy.[18]

[12]Cass. 4 mai 1905, Dall. 1906. 1. 173. *Cf.* Cass. 26 juill. 1905; Dall. 1907. 1. 295; Marshall *v.* Wild Rose [1909] 2 K. B. 46.

[13]Clover, Clayton & Co. *v.* Hughes [1910] A. C. 242, 248, *per* Lord Macnaghten.

[14]Official Circular of the Minister of Justice of June 10th, 1899.

[15]1 Sachet A., Traité sur les Accidents du Travail (5th ed.) n. 256.

[16]Bordeaux, 23 avril 1907, Sir. 1908. 2. 45; 1 Sachet n. 266.

[17]See Ruegg, Workmen's Compensation Act (10th ed.) 323.

[18]Pugh *v.* London etc. Ry Co. [1896] 2 Q. B. 248.

In that case a signalman saw that a collision between two trains was imminent unless he could stop one of them. He succeeded in doing so but the excitement caused a shock to his nervous system which incapacitated him for his employment. This case is cited with approval by Lord Macnaghten in what is now the leading decision.[19] And in both France and England the cases are to the effect that injury caused by an effort of the workman in the course of his work is an accident.[20]

In the light of these decisions a better definition of accident than those given above would be that suggested by M. Loubat: "any bodily lesion or psychical disturbance resulting from the sudden action of an external cause or from a violent effort."[21] But since the last judgment of the House of Lords even this is too narrow, at any rate in England. The effort does not need to be violent. It is enough that it caused the injury.[22] Where a workman employed to turn the wheel of a machine ruptured himself by an act of overexertion, the Court of Appeal held that this was not an accident. There was a lack of the fortuitious element. The man was doing his work in the ordinary way. In their view "accident" implied some force operating from outside which caused the injury. But the House of Lords rejected this criterion. Lord Robertson said, with his usual point, "No one out of a Law Court would ever hesitate to say that this man met with an accident." The fortuitous element, if any such element is implied in the term "accident," lay in the miscalculation of the resisting forces of the wheel and the man's body.[23]

The latest, and what is now the leading case in England, carries the principle a stage further. A workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell dead. The county court judge found upon conflicting evidence that death was caused by a strain. The evidence was that the disease of the heart was so advanced that the workman might have died at any time. The strain in tightening the nut was very slight. The House of Lords held by a bare majority, affirming the judgment of the Court of Appeal, that there was

[19]Clover, Clayton & Co. Ltd. *v.* Hughes *supra.*

[20]Lyon, 7 juin 1900, Dall. 1901. 2. 12; Reg. 17 fevr. 1908, Dall. 1908. 1. 244; Cass. 27 mai 1908, Dall. 1909. 5. 30; Fenton *v.* Thorley [1903] A. C. 443.

[21]Risque Professionnel n. 434.

[22]Clover, Clayton & Co. Ltd. *v.* Hughes *supra.*

[23]Fenton *v.* Thorley *supra.*

evidence to support the finding.[24] The case went, no doubt, partly on the technical ground that the finding of the trial judge must be treated like the verdict of a jury, and not interfered with merely because the Court of Appeal might have come to a different conclusion if they had been judges of the facts. Even upon this footing the decision is not very convincing. One cannot help feeling that there is great force in the dissenting opinions which proceeded on the view that the man died from heart disease and not from "accident."

Even a disease may be an accident if due to a sudden infection which can be assigned to some determinate fact connected with the employment, as if a workman contracts anthrax in handling wool. There is here the sudden and unexpected element. It is an accident that the bacillus is present and it is an accident that it strikes the workman at a spot where there is some abrasion of the skin which permits its entrance into the system. The French and English decisions agree upon this point also.[25]

An accident due to the forces of nature, such as a sunstroke, is not one for which compensation will be payable, unless the nature of the occupation especially exposed the workman to such a risk. But when a mason had to work in extremely hot weather against a wall, which reflected the sun's rays, and met with a sunstroke, it was held in France that this was an industrial accident.[26] And in an English case, on similar grounds, where a coal-trimmer working in the stoke-hole of a steamship and exposed to great heat, died from a heat stroke, this was held to be an "accident."[27] It was the employment which created a peculiar risk. The liability to an accident may vary according to the state of health or the idiopathic condition of the workman. An old man is more liable to meet with an accident than a young one, a short-sighted man than a man with normal vision, and so on. But every man brings some disability with him, and the law looks only at the proximate cause of the injury, and does not go back along the train of circumstances and trace the accident to some remote source.[28]

Moreover in estimating the compensation to which the victim

[24]Clover, Clayton & Co. Ltd. *v.* Hughes *supra.*

[25]Brimtons *v.* Turvey [1905] A. C. 230; Toulouse, 5 mai 1909, Sir. 1909. 2. 254.

[26]Trib. civ. de Lyon, 26 déc. 1907, Dall. 1909. 2. 133.

[27]Ismay, Imrie & Co. *v.* Williamson [1908] A. C. 437.

[28]Cass. 24 Oct. 1904, Sir. 1907. 1. 356; Cass. 18 juill. 1905, Dall. 1908. 1. 241.

of an accident is entitled, it appears that the sole element for consideration is the reduction of his earning power by the accident, and that no account is to be paid to his previous state of health or bodily condition. So if a one-eyed man loses the sight of his one eye by an accident, he is as much entitled to claim compensation for absolute and permanent incapacity, if this is the effect of his total blindness, as if he had been deprived by the same blow of the sight of both eyes.[20] It makes no difference that the previous infirmity was one for which his present employer was in no way responsible. It may have been congenital, or it may have been due to an accident suffered in another employment. With such considerations the court will have no concern; the only question is by how much has the earning power of the workman been reduced in consequence of the accident.

The practical consequences which result from this solution were probably not contemplated by the legislature. Experience in both France and England goes to show that the Workmen's Compensation Acts greatly prejudice the chances of employment of workmen whose health is unsound or who are subject to any partial incapacity. A man who has lost the use of one eye or one ear finds it more difficult to find work than formerly, because the employer knows that in his case he runs a risk of having to pay larger compensation if the workman should lose the use of his single good eye or good ear. Similar considerations apply to old men or those who have a tendency to disease. The employer has every inducement to employ as far as possible only young and robust workmen. The Poor Law Report of 1909 in England lays considerable weight on this as one of the causes of pauperism. Unless the labor unions allow elderly men, or men suffering from some infirmity or tendency to disease, to be employed at less than the fixed minimum rate of wages, there is ground to fear lest the Workmen's Compensation Acts, intended to be remedial, should be seriously prejudicial to the interests of such workmen. This is a matter to a great extent within the power of the labor unions to regulate and their manner of dealing with it will be anxiously scrutinized.

The question whether an accident was in the course of the employment is one of fact and in some cases depends upon delicate considerations of the particular circumstances. The risks covered

[20] Cass. 11 nov. 1903, Dall. 1904. 1. 73; Loubat n. 581. *Cf.* Wicks *v.* Dowell & Co. [1905] 2 K. B. 225.

by the acts are those to which the injured person are exposed by reason of the industry, and not such as happen to him merely as a man and not as a workman. The fact that the accident happend during the time of work, though very material, is not in itself conclusive. For example, in a recent English case a lady's maid was sewing in a lighted room at night when a cockchafer flew in at the window. In trying to keep it from her face the maid raised her hand suddenly and struck her eye, thereby causing severe injury. It was held by the Court of Appeal that the Act did not apply. The accident did not arise from a risk incidental to the employment.[30]

When an accident is caused by any defect in the machinery or equipment there is no doubt that compensation is payable, and the same is true in general in accidents caused by the negligence of a fellow workman of the victim, although this fellow workman may not have been at the time engaged in the course of his work. This at any rate is the accepted view in France, and two very equitable reasons are given for such a construction. In the first place, the enforced contact with a number of fellow employees, some of whom are sure to be careless, makes industrial employment especially dangerous; and in the second place, a workman whose attention is occupied by his work, cannot at the same time keep a watch on things going on around him. So in a number of French cases where a workman has been shot, owing to the imprudence of a fellow workman in handling firearms, it has been held that the Act applied.[31]

As a general rule an accident which happens to the workman when he is not upon the premises of the employer, is not one for which he is entitled to compensation, unless he has been sent outside the premises on his master's business. While he is within the premises he is covered by the Act, as well when he is going to his work or returning from it, as when he is actually engaged at work. So if a workman has to make his way through a wood-yard strewn with obstacles, amidst building materials placed in unstable positions, and is injured by the fall of some planks, this is an industrial accident.[32] But a workman is not protected if in going to or from his work on the premises he is taking a route which is not usual or permitted. In one case a workman was em-

[30]Craske *v.* Wigan [1909] 2 K. B. 635.
[31]Nancy, 9 mai 1900, Dall. 1901. 2. 85.
[32]Besançon, 24 oct. 1900, Dall. 1901. 2. 276.

ployed in decorating a church. One morning being unable to open the door of the building, he climbed over a spiked railing and got in by a window. In climbing the railing he spiked his foot and sustained an injury which caused his death. It was held in a Scotch case that this accident did not arise out of his employment.[33] During interruptions of work when the man is upon the premises he will generally be protected unless he has gone to a part of the works where he has no business. Where a carter who was taking his lunch in the stable was bitten by the stable cat, this was held to be an industrial accident.[34] The workman on his way to his work, and before he enters the premises is a man and not a "workman," and travels at his own risk. But this will not be so when it is part of the contract that the employer shall carry him to and from his work.

The French law is more liberal than the English in allowing compensation when the accident is caused by horse-play or "larking" of fellow workmen in which the victim did not voluntarily participate. In England this is not considered to be an industrial accident, and when some workmen, by way of a joke, attached the hook of a hoist to the collar of a fellow workman by which he was lifted from the ground and injured, it was held that he was not entitled to compensation from the employer.[35] In France a different view is taken. In one case a workman was at his work when a fellow workman passing by snatched off his cap and ran away with it. In running to recover it the workman fell and sustained a fatal injury, and it was held that his relations were entitled to the statutory compensation.[36] This difference of result is perhaps to be explained by a difference in the language of the two Acts. By the English Act the accident must be one "arising out of, *and* in the course of the employment." Under the French Act it is a "happening by the fact of the work, *or* on the occasion of the work." Such an accident as that mentioned does not satisfy the double requirement of the English law, "it is in the course of the employment," but it does not "arise out of" the employment.

An attack made by a fellow workman is not an industrial accident if it has no relation to the work and does not arise out of any dispute connected therewith. But the result would be different if

[33]Gibson *v.* Wilson (Scotland 1901) 3 F. 661.
[34]Rowland *v.* Wright [1909] 1 K. B. 963.
[35]Fitzgerald *v.* Clarke & Son. [1908] 2 K. B. 796.
[36]Cass. 8 juill. 1903, Dall. 1903. 1. 510.

the attack arose out of the employment, as, for example, if a watchman were killed at his post by a fellow workman who wanted to commit a theft, or if a workman assaulted a cashier in a dispute between them with regard to the amount of wages due to the workman.[37]

As a general rule an injury caused to a workman, during his employment, by the tort of a stranger unconnected with the employment is not covered. But in certain employments there may be special risks of suffering from certain tortious acts. So where is was proved that boys were in the habit of dropping stones from a bridge upon trains which passed beneath, and an engine driver was injured by a stone which was dropped in this way, this was held to be a risk incidental to the employment.[38]

In France it is held that compensation is not payable in respect of an accident to a workman who is doing something outside the scope of his ordinary duties, and is away from the ordinary place of his employment, though he is acting for the employer as an individual. For example, if an employer asks one of his workmen to take the employer's family in a boat and in so doing the workman is drowned, this is a personal and not an industrial accident. There have been a good many cases of this kind, and the German law has now been amended to meet them, and contains a provision, that the insurance shall extend to domestic or other services which the persons insured have been incidentally called upon by the employer to perform.

Both the English and the French Acts classify the cases in which compensation is payable under the heads of death, total incapacity for work, and partial incapacity. In the case of absolute and permanent incapacity the French law allows the workman an annuity equal to two-thirds of his annual wages. In England and in the Province of Quebec he is only entitled to fifty *per cent.* of his previous earnings. Where the incapacity is permanent and partial the workman is by the French law entitled to an annuity equal to half the sum by which his wages have been reduced in consequence of the accident, and this scale has been followed in Quebec. Under the English Act there is more discretion allowed to the court; but it is provided that the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the

[37]Dijon, 30 mars 1903, Dall. 1904. 2. 166.

[38]Challis *v.* L. & S. W. Ry. Co. [1905] 2 K. B. 154.

average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper. For temporary incapacity both in England and France the compensation is equal to one-half the daily wages. In regard to compensation for death there is an important difference between the two laws. By the English Act the workman's dependents, if wholly dependent upon his earnings, are entitled to a lump sum equal to three years' earnings, but not exceeding in any case £300 ($1,459.95). Dependents only in part dependent upon the workman's earnings are entitled to such an amount as may be agreed upon or determined by arbitration under the Act. Under the French law when a workman has been killed his widow and children under sixteen years of age, and, if he leaves no widow nor children, his ascendants or descendants who were supported by him are entitled to annuities. But the total of all these annuities is not to exceed thirty *per cent.* of the deceased workman's wages. There was a good deal of discussion in Quebec as to whether the English policy of awarding a lump sum as compensation in the case of death, or the French plan of giving annuities to the relatives was to be followed. In the end the English method was preferred, and the Act provides that the compensation shall consist of a sum equal to four times the average yearly wages of the deceased and shall in no case be less than $1,000 or more than $2,000. To this limitation, however, there is one exception, *viz.*, when it is proved that the accident was caused by the "inexcusable fault" of the employer. No doubt many attempts will be made to prove inexcusable fault, and the successful working of the Act will depend to a considerable degree upon the view taken by the courts as to what amounts to "inexcusable fault." This term has, however, been taken from the French Act and there have been many interpretations of it in France. It is pretty well settled there that a fault is not regarded as inexcusable unless there is in it the element of wilfulness. There must be a gross and wilful neglect on the part of the employer to perform his duty to protect the safety of his workmen.

Both in England and in France considerable disappointment was felt at the large number of cases which came before the courts under these acts. It had been anticipated that the result of this legislation would be a great diminution in the volume of

litigation. This hope did not seem by any means to be realized. It must, however, be borne in mind that these Acts vitally affect the interests of millions of persons and that the total number of industrial accidents is appallingly great. Moreover these acts raised for the first time questions which had to be decided, such as what was meant by the term "accident," when an accident is in the "course of the employment," and many others. There had to be a determination of many doubtful matters before employers and workmen could feel safe in making agreements as to the compensation to be paid, or before insurance companies could be able to calculate their risks. Many of these questions have now been settled in both countries, and it is to be anticipated that there will be a proportionate diminution in the cases.

It is too early to speak with confidence of the result in the Province of Quebec, as the Act there has only been in operation for six months. I am informed, however, that many of the largest corporations are settling almost all the claims against them, and there is a very marked falling off in the number of cases coming before the courts.

One of the advantages of borrowing the language of the French law is that we have the judgments of the French courts for the last ten years to serve as a guide for our judges. Many points have been discussed so often in the French courts that the law upon them has been placed on a settled basis.

Other men labored, and we are entered into their labors.

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